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FILE: EAC 06 195 53704 Office: VERMONT SERVICE CENTER Date: **JAN 02 2008**

IN RE: Petitioner:
Beneficiary:



PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann
Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The director denied the nonimmigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

The petitioner is a software consulting and product development company that seeks to employ the beneficiary as a software engineer. The petitioner, therefore, endeavors to classify the beneficiary as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition, finding that the beneficiary was ineligible for H-1B status, as the numerical cap for fiscal year 2007 had already been exhausted. The director determined that the basis of the petitioner's request for approval was exemption from the numerical cap, based upon the fact that the beneficiary had been previously granted H-1B status within the previous six years (and had therefore already been counted toward the numerical cap).

On appeal, the petitioner states that it improperly marked the Form I-129, due to clerical error, to indicate that the beneficiary was exempt from the numerical cap as a result of having been previously granted H-1B status during the previous six years. The petitioner acknowledges that the beneficiary has never held H-1B status and is therefore subject to the cap. The petitioner requests that the petition be approved, as the petition was accepted and a visa number assigned. Otherwise, the visa number "will just go wasted without any single person's benefit." In the alternative, if the petition is not approved, the petitioner requests that its filing fees be refunded.

The record of proceeding before the AAO contains (1) the Form I-129 and supporting documentation; (2) the director's request for additional evidence; (3) the petitioner's response to the director's request; (4) the director's denial letter; and (5) the petitioner's Form I-290B and supporting documentation, including counsel's appellate brief. The AAO reviewed the record in its entirety before issuing its decision.

The petitioner filed the petition on June 7, 2006. The petitioner marked the box at Page 11, Part C, Question 5 of the Form I-129 to indicate that the petition was exempt from the numerical cap as a result of his having been previously granted H-1B status within the previous six years (and therefore having already been counted toward the numerical cap). The Vermont Service Center accepted the petition as one involving a request for adjudication of a petition involving a beneficiary who has been granted H-1B status within the previous six years. Upon review of the petition, the director determined that the petitioner had not submitted evidence demonstrating that the beneficiary had ever been in H-1B status, and issued a request for evidence of the same on October 18, 2006. The AAO acknowledges the petitioner's statement that it marked the incorrect box on the Form I-129. However, the director properly adjudicated the Form I-129 based upon the record before him.

As the petition was properly adjudicated, the petitioner may not receive a refund. Nor may the petition be approved, as it is subject to the fiscal year 2007 numerical cap, which was reached on May 26, 2006.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed. The petition is denied.